United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1174

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

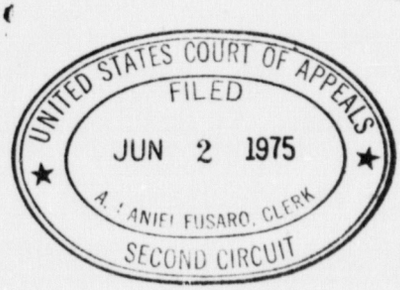
-against-

JAMES REED,

Defendant-Appellant

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

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- v - : DOCKET NO. 75-1174

JAMES REED, :

Defendant-Appellant: :

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On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLANT

Preliminary Statement

This is an appeal from a judgment of conviction of conspiracy to violate the federal narcotics law [21 U.S.C. §841 (a) (i) 841 (b) (1) (A)] after a trial by jury of a one count indictment. The defendant was sentenced by Judge Edmund L. Palmieri, the judge who presided over the trial, to a term of fifteen months in prison to be followed by three years' special parole. The trial judge denied bail on appeal and the defendant is presently incarcerated.

The case was originally assigned to Judge Robert Carter and on February 10, 1975 was transferred to Judge

Palmieri for trial. Prior to that day, defense counsel had requested a bill of particulars returnable on January 24, 1975 pursuant to Rule 7(f) F.R.C.P., and had met informally in connection with the request with the United States Attorney on January 30, 1975. There was never any court ruling on the request for the bill of particulars but the Government responded orally and by letter dated February 6, 1975 (A-16).* Among other things, defense counsel had requested disclosure of any electronic surveillance and was told on January 30, 1975, and by the February 6, 1975 letter from the United States Attorney that there was no electronic surveillance of any kind in the case (A-16). A written statement of defendant (3502, A-22, by notation of an assistant United States Attorney) was turned over to defense counsel on January 30, 1975 and a hearing to determine the question of its voluntariness under Miranda v. Arizona, 384 U.S. 436 (1966) was agreed to be held prior to trial.

When the case was called on February 10, 1975, defense counsel was then advised for the first time that there was electronic surveillance and contrary to the response of the Government to defendant's request for a bill of particulars, that the prosecution intended to

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* References to the Appellant's Appendix will be made by "A" followed by page number.

introduce in evidence a tape-recorded conversation of defendant Reed with a federal narcotics agent. Defense counsel objected and at the very least sought an adjournment to meet this new and unexpected development. The court dismissed a waiting jury panel and ordered the Miranda hearing to proceed. At that hearing it was conceded that the defendant requested a lawyer after he was given his Miranda warnings. Despite the absence of any testimony of the defendant's express waiver of those rights, and the admission of the interrogator that he did not ask the defendant if he waived his rights, the court ruled the confession admissible. The court then put the case over to February 13, 1975 to permit defense counsel to fulfil an appointment to appear in the New York Court of Appeals in Albany the next day.* The case was then set down for the next court day which was February 13, 1975, and, over defense counsel's objection, proceeded to trial which lasted two days. The defendant was found guilty and remanded to jail on February 14, 1975.

QUESTIONS PRESENTED

1. Was it reversible error for the court to permit the introduction into evidence of electronic eavesdropping, or in the alternative to refuse an adjournment to the defendant who was confronted with such evidence

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* February 12, 1975 was a holiday.

on the eve of trial, the government having denied that there was such evidence orally and in writing in response to a bill of particulars?

2. Did the court violate the teaching of Miranda v. Arizona in holding a statement given to law enforcement agents at the time of defendant's arrest as completely voluntarily where a written record and oral testimony bear out defendant's contention that there was no express waiver of his right to counsel before the interrogation commenced.

(a) In this connection did the trial court err in questioning the government's witness over objection as to his "usual" practice in taking statements from defendants?

3. Was it reversible error for the court to refuse to ask any questions on voir dire on the issue of race where defense counsel representing a black defendant posed meaningful questions in writing prior to the commencement of the voir dire?

4. Did the court interfere unduly and erroneously in the cross-examination of government witnesses in a manner calculated to make such cross-examination ineffective and to bolster the veracity of such witnesses, denying the defendant a fair trial?

5. Was it an abuse of discretion for the court to refuse defendant's motion to withdraw from the jury's con-

sideration on the issue of credibility, a five-year old conviction for possession of stolen property?

6. Was it reversible error for the court to refuse to instruct the jury on entrapment, and on certain legal principles concerning the defendant's withdrawal from the conspiracy, and his participation in a single transaction, not amounting to conspiracy where such instructions were requested and bore out the defendant's theory of the case?

7. Did the court err irreversibly in misleading the jury by emphasis on the defendant's supposed confession that he had negotiated a $7000 sale of cocaine where there was no evidence of such $7000 transaction attributed to the defendant by way of confession, and where the reference undercut defense counsel's summation?

8. Did the aggregate of the seven errors enumerated above join together to deprive the defendant of his constitutional right to a fair trial?

FACTS BELOW

At the pretrial Miranda hearing a document was marked in evidence, 3502 (A-22) which was essentially a form made up of questions setting forth the formal Miranda warnings with blank spaces to be filled in by the questioner who in this case was Alan Kaufman, an assistant United States Attorney. The significant omission occurred after the form questions on

refusal to answer, right to remain silent, consult an attorney and have one appointed if necessary. Following those questions and the defendant's response "needs appointed lawyer" was the all-important question which involved the issue of whether or not, the defendant having been advised of his rights, wished to waive them and speak to the prosecution official. In the form in the case at bar the question read:

> "Understanding your rights as I have explained them, do you want to give me some information at this time about your background and your version of the facts?" (A-23)

Although every other question was answered, the response to this question was left blank following which the defendant answered all the factual questions about his personal background. In addition, the defendant's "statement" appeared as follows:

> "Last winter I negotiated to sell a 1/4 kilo to a black guy. Was going to get the cocaine from people at the carpet place at 97th and Park Ave. (R. & O. Carpet). Guy I was dealing with there was named "Red," who was a black guy. The sale fell through because I left town to go to West Virginia." (A-24)

At the hearing Kaufman testified that he had written down all the important things the defendant said, particularly with reference to Miranda, the principles of which he was familiar with, and Kaufman specifically said he did not ask the defendant if he was willing to waive his Constitutional rights before answering any questions (Vol. I, p. 15, 20, 24).*

Questions were put to the witness on redirect by the prosecutor and by the court, itself, over objection as to what the usual practice of Mr. Kaufman was when he wrote down "needs appointed lawyer." Defense counsel objected and asked to have stricken the prosecutor's response concerning what he generally "would do" if a defendant needed an appointed lawyer (Vol. I, p. 32, 34, 35). At the conclusion of the hearing which also included testimony of the defendant the court found (in the absence of any evidence and based its opinion on speculative conclusions founded on what Kaufman would have done if the defendant said he wanted a lawyer on the spot) that the defendant, knowing his rights under Miranda, had waived them (Vol. I, 60-62).

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* References to the transcripts of the proceedings below which took place on February 10, 13, 14 and April 8, 1975, and which are contained in two separate volumes separately paginated will be made by reference to Vol. I (proceedings of February 10, 1975) and Vol. II (proceedings of February 13, 14 and April 8, 1975) followed by page number.

Over defendant's objections that he was not ready for trial because there had been no ruling on his request for a Bill of Particulars and also that he had been misled by the government's oral and written response to the bill of particulars as to the existence of electronic surveillance, the trial proceeded on February 13, 1975 (Vol. II, 2-7). On voir dire defense counsel requested in writing on behalf of the black defendant that the court interrogate the prospective jurors specifically on the issue of their race prejudice (Vol. II, 18, 19). The two questions sought to be asked were:

1) Have any one of you in the course of your lives had any unpleasant experience with either an individual or a group of persons different from your own racial group -- with Blacks?

2) Have any of you ever belonged to any organization, labor union, tenants' group or body of any kind which was involved in a racial dispute? If so what was the nature of the dispute? When did it take place? (A-26)

Counsel specifically asked that some meaningful questions be asked on voir dire of the panel on the race issue and stated that there was law, i.e. United States v. Aldridge, 283 U.S. 308 (1931) to support that position. The court arbitrarily refused to ask any questions of the prospective panel on the issue of race prejudice and defense counsel excepted (Vol. II, 18, 19).

Prior to the commencement of the trial, defense counsel, in anticipation of the defendant's taking the

witness stand, moved to exclude one prior criminal conviction from being used to impeach the defendant (Vol. II, 7). The conviction on a plea of guilty was for criminal possession of stolen property in the second degree on June 16, 1970 in Bronx County (Vol. II, 21, 22). The court below ruled arbitrarily that the five-year-old conviction was somehow relevant to credibility in this case (Vol. II, 22). The defendant thereafter did not take the stand.

The evidence against the defendant was as follows:

William Simpson, a special agent for the Drug Enforcement Administration, was negotiating with a Lucian Feldon (an unindicted alleged co-conspirator in this case) to purchase a sizeable quantity of cocaine (Vol. II, 46). He made an appointment with Feldon at his residence on February 13, 1974 and was joined there by another special agent, Carlisle Gordon, whom he introduced to Feldon as his "brother." After some conversation and the showing of a sample of cocaine, a telephone call was made to a "Jerry" by Feldon who then said he could sell the agents a quarter kilogram of cocaine for $7000 and that "Jerry" would come to the apartment about 3 o'clock. Simpson told Feldon he would have to go to Brooklyn to get the money and would call before he returned (Vol. II, 47). Simpson called back at 3:30 p.m. and was told to and did return to the apartment where he and Gordon met "Jerry." "Jerry" wanted them

to give him the $7000 and he would then go out and return with the cocaine (Vol. II, 47, 48). "Jerry" then made a call to his "source" who agreed, said "Jerry," to meet with all of them at 96th Street and Park Avenue (Vol. II, 48). At 96th and Park Avenue Simpson met Jimmy, the defendant, who had driven up in a 1969 gypsy cab Cadillac. Simpson told Jimmy he wanted to purchase a quarter of a kilogram of cocaine. The defendant said he could get it but he would have to have the money. Simpson again said he had to see the merchandise first (Vol. II, 49, 64).

The defendant then walked up the block and returned saying "I know these people are not going to do it that way" and then said he might be able to get some flake cocaine (Vol. II, 50).

The defendant then went into a candy store and made a telephone call and returned to say that a friend at 133rd Street in Manhattan had a quarter kilogram of flake cocaine for $6500 which can be gotten either at his (the defendant's) apartment in the Bronx or in his (the defendant's) car at 133rd Street. Simpson chose the second alternative but said they must wait for his "brother," Special Agent Gordon, who had the money (Vol. II, 50). After about 15 minutes, the defendant said he had to leave and gave Simpson his telephone number to contact him in the next few hours and then defendant left. Nothing further transpired (Vol. II, 51, 52).

On February 19, 1974 Agent Simpson again contacted the defendant by telephone, which conversation was electronically taped, and they set up, said Simpson, another appointment to meet at 96th and Park Avenue "to continue the negotiations for the one quarter kilogram of cocaine."* The transcript of the tape was admitted in evidence as Exhibit 1 over objection of the defendant that the government had denied the existence of the tape or any such recordation until the eve of trial (Vol. II, 53, 54).

Simpson had no further contact with the defendant after the two taped telephone conversations although there were tentative arrangements made -- to be confirmed by the defendant -- to meet later that day at 96th and Park Avenue.

The tape, itself, is somewhat inconsistent with Simpson's testimony. It is set forth in full in Appellant's Appendix (A-18-21).

From the context of the conversation -- assuming that Simpson was correct that they were discussing a sale of cocaine -- it does not appear that any definite transaction was arranged for on the preceding February 13, 1974, as both agents Simpson and Gordon implied nor that there was any connection between this conversation and what was supposed to have occurred on February 13, 1974.

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* The record erroneously reads 76th Street and Park Avenue instead of 96th Street (Vol. II, 52).

At the commencement of the conversation, as reflected on the tape, the defendant asked:

> "I had to find out if you were interested in A or the whole?
>
> * * *
>
> "Cause ah, I could give them know (sic) figures, cause I didn't know what you were looking for." (A-18)

Agent Simpson responded by reference to a meeting or conversation not otherwise mentioned by him.

> "You told me last night you got to tip some place around at 5:30 p.m." (A-19)

Simpson continued in what was a somewhat incomprehensible but showily "conspiratorial" vein,

> "But like my thing is, I just want to you know, go to the spot, ah, see the thing. I'll drop it on you, you know, and, ah, we get the thing, we do it that way." (A-19)

Then again in the same key Agent Simpson said

> "You know, and ah, I let you count the money, you know and we can talk on the street." (A-19)

The defendant then made reference to his anticipation that "they" would be there at two o'clock, and "it" would be there, and he arranged to call the agent back in ten minutes.

The defendant called back in ten minutes (indicated in the tape but <u>not</u> testified to by anyone) and spoke of meeting Agent Simpson at 96th and Park Avenue -- he said he will see him later, but would call first. (A-21)

There was no mention of any later call that day or at all, and, in fact, there was no testimony that Agent Simpson and the defendant did meet again.

In the course of his cross-examination, Agent Simpson admitted that he was "an undercover agent for the making of drug transactions" (Vol. II, 56, 57), and that further, the purpose of his job as an undercover agent was to drum up drug transactions" (Vol. II, 58). Agent Simpson admitted that he tried to get the defendant to purchase (and sell) some drugs but that he didn't make it (Vol. II, 58). Agent Simpson also admitted that in his capacity as a special narcotics agent, he told "a lot of lies" (Vol. II, 59).

Special Agent Gordon corroborated Simpson's account (Vol. II, 67, 68), but added details concerning events of February 19, 1974. He went with Agent Simpson on that day to 96th and Park Avenue and when they arrived were told that "the fellow that we were looking for [the defendant] had just left" (Vol. II, 69). On cross-examination Gordon was asked,

> "When you went to 96th and Park Avenue on the 19th of February did you go there to try to find the defendant?"*

Gordon responded that he was told that the defendant would be there at that time. He was then asked,

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* The transcript again erred as to numbers. The question concerned his testimony on direct examination concerning the event of February 19, 1974. The reporter erroneously wrote February 13 (Vol. II, 73).

"Do you know at this time whether or not if Mr. Reed [the defendant] was there, whether or not he had come to tell the two of you he didn't want to sell you any cocaine, he didn't want to play any game?

"A Yes, I was told he was there." (Vol. I, 73)

On cross examination Agent Gordon was asked

"Do you ever engage in telling untruths in your undercover work?" (Vol. II, 72)

He answered:

"No, I don't."

Again he was asked:

Q "You tell the truth wherever you go as an undercover officer?

A Yes" (Vol. II, 73).

On redirect, the prosecutor attempted to rehabilitate the witness and the following colloquy occurred:

"Q When you act as in an undercover capacity do you use different names?

A Yes.

Q Different identities?

A Yes.

Q So when you can, do you always tell the truth?

A I always tell the truth in court, but in the field working, no, I don't"(Vol. II, 73, 74).

This exchange prompted the following from defense counsel on recross examination:

"Q Let me ask you a little bit about the truth. Do you think it is all right to lie to people if you can arrest them?" (Vol. II, 74)

Although no objection was interposed, the court refused to permit an answer to the question and, in addition, blunted the effect of the cross-examination completely by first telling defense counsel that she was "arguing with the witness" and then expressly minimized the prior untrue statement of the witness, viz:

> [BY THE COURT] "He (Gordon) has admitted in the course of his work he has had to use guile and misrepresentation.* Now I will not permit you to continue this line of questioning in terms of the truth, of what he believes to be the truth." (Vol. II, 75)

Three other federal agents testified, corroborating the testimony of Simpson and Gordon as to their appearances at the various locations, particularly 96th and Park Avenue, which they had under covert surveillance on February 13 and 19, 1974. There were eight federal officers assigned to the transaction in addition to three state police officers (Vol. II, 83, 95). It was conceded that no purchase of cocaine or any narcotic was consummated (Vol. II, 96). Special Agents Paul Sennett and Thomas Sheehan each observed the defendant at this location of 96th Street and Park Avenue at about 2:30 p.m. on February 19, 1974 (Vol. II, 89, 92, 93). Sheehan observed the defendant get out of his car and go to a grocery store and then go into a carpet store with "a black fellow" (Vol. II,

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* The Special Agent had expressly not done so until reminded of it by his redirect examination.

93). The defendant did not meet with any agents on that day (February 19, 1974).

Also at the trial Agent Kieran Kobell testified over objection that he had heard a statement of the defendant at the time of his arrest which was as follows:

> "Mr. Reed's statement was that last winter Mr. Reed admitted that he had negotiated with a black agent in the vicinity of 96th Street and Park Avenue, had negotiated for one quarter kilogram of cocaine, and Mr. Reed was to purchase this cocaine from a black man by the name of Red, and this Red worked in R&O Carpet Shop, which was on Park Avenue at 97th Street, and Mr. Reed stated that due to the fact that he traveled to West Virginia shortly after those negotiations with Special Agent Simpson, was not able to complete the deal, and Mr. Reed further stated that he had been in West Virginia staying with his mother there until just a short time prior to the day he was arrested -- by a short time I mean a matter of weeks" (Vol. II, 81).

The defense rested at the conclusion of the government's case.

Defense counsel submitted certain proposed instructions (A-28-35), including one based on the defendant's theory of the case, that if any conspiracy existed it was based on entrapment (Proposed Instruction No. 4). Moreover the court refused to permit defense counsel to use the word "entrapment" in her summation (Vol. II, 109, 110).

In her summation, defense counsel urged inter alia that the jury not believe Agent Simpson's (and Gordon's) testimony because it did not logically fit together. It

was not clear why there was no sale of the $7000 cocaine on February 13, 1974 (Vol. II, 123) and that the recorded conversation on February 19, 1974 seemed to indicate only preliminary negotiations and not any sort of continuation of the supposed conspiracy of February 13, 1974 (Vol. II, 125). Specifically, defense counsel emphasized that the lack of mention of the $7000 or any definite sum at the February 19, 1974 conversation indicated that the prior conversation had not taken place (Vol. II, 126).

Defense counsel further urged that the reference in the tape to the defendant's calling Simpson later meant that he either called Simpson later and said he was not going to deal in narcotics or that the defendant went up to 96th Street that afternoon to tell the agents that he would not commit a crime.

In the prosecutor's summation he took out the document referred to as 3502 (A-22) -- the so-called statement taken by Assistant United States Attorney Kaufman which was the basis for the pre-trial hearing, and, over the objection that it was never introduced in evidence, read from it (Vol. II, 135).

CHARGE*

The court gave a charge which assured conviction of the defendant. The court refused in the face of exceptions of defense counsel to give instructions on entrapment. It refused to give a proposed instruction (No. 10, A-34) that participation in a single narcotics transaction may be insufficient to warrant a conviction for conspiracy and refused to instruct on the requirement that there must be independent evidence tending to prove the defendant had knowledge of the broader conspiracy. The court further refused to give any instruction on the effect of defendant's abandonment of the conspiracy if they should so find, as proposed (No. 9, 11, 13, A-33-35).

The court further refused to give an instruction on the requirement that to be found guilty of conspiracy the law requires something more than mere knowledge, approval of or acquiescence in the object or purpose of the conspiracy as requested (No. 12, A-35).

The court further misstated the evidence saying that in the purported confession of the defendant, he admitted negotiating for the sale of a quarter of kilo of cocaine for $7000 (Vol. II, 165, 169, 175) -- thus undercutting the thrust of defense counsel's summation. Excep-

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* The court granted defense counsel an exception to all of the proposed instructions submitted but not given (Vol. II, 104, 181).

tion was duly taken (Vol. II, 182-184, A-79). The court, having delivered a charge which in its entirety suggested that the jury convict the defendant, advised counsel after exception was taken,

"I am sorry I made that mistake" (Vol. II, 183, A-81).

Counsel stated that she did not know "how it (the error) can be cured." Thereafter the court admitted its error to the jury (Vol. II, 184, A-82), and the case was submitted. The jury convicted the defendant after several hours of deliberation (Vol. II, 187).

ARGUMENT

Preliminarily it is the defendant's contention after a brief trial of a case involving a charge of conspiracy to deal in narcotics -- a conspiracy the object of which was never effected despite the efforts of eight federal narcotics agents and three state narcotics agents, all of whom sought to persuade the defendant to sell them a quarter kilo of cocaine -- that at each stage of the proceedings the trial court made its rulings against the defendant. It is further defendant's contention that if no single error warrants a reversal of the conviction the sum total of the errors, when viewed against the record, requires that this court reverse the conviction below (see Point Eight, infra).

POINT ONE

THE COURT BELOW COMMITTED REVERSIBLE ERROR IN REFUSING TO PRECLUDE EVIDENCE OF ELECTRONIC SURVEILLANCE OR TO GRANT A CONTINUANCE TO DEFENDANT TO MEET THE SURPRISE OCCASIONED BY THE DISCLOSURE OF SUCH EVIDENCE ON THE EVE OF TRIAL, AND CONTRARY TO THE GOVERNMENT'S PRIOR RESPONSE TO DEFENDANT'S REQUEST FOR A BILL OF PARTICULARS WHICH DENIED THE EXISTENCE OF ANY SUCH EVIDENCE.

By letter of February 6, 1975, to defense counsel, Richard J. Haskins, Assistant United States Attorney, stated:

> "As we agreed at the conclusion of our meeting on January 30, I am sending this letter to memorialize the government's position with respect to your combined motion for bill of particulars and discovery dated January 8, 1975.
>
> * * *
>
> "6. There was no electronic eavesdropping by the government of the defendant Reed." (A-16)

When counsel appeared before Judge Palmieri on February 10, 1975 she vigorously protested the disclosure for the first time, and contrary to the prior representation of the government, that it intended to introduce in evidence a tape recording of a conversation between Special Agent Simpson and the defendant made on February 19, 1974. She said she was not ready for trial and requested an adjournment to meet the surprise of this new development (Vol. I, 2, 3). The court had already been advised of defense counsel's engagement in Albany the next day for argument in the New York Court of Appeals and February 12 was a holiday

(Vol. I, 6-10). Instead of granting the continuance requested, the court held a Miranda hearing on February 10, 1975 and set the case down for trial on the next court date, February 13, 1975, when the trial proceeded over defense counsel's objection (Vol. II, 2-7).

The transcript of the electronic surveillance was introduced in evidence as government's Exhibit 1 (A-18) over defendant's objection that the government had previously denied the existence of such a recording in its written response to the defendant's bill of particulars (Vol. II, 53, 54). The government did not even seek to amend its response to the bill of particulars in offering the tape, it simply and cavalierly ignored the fact that it had responded otherwise and the court permitted it to proceed despite the surprise and prejudice to the defendant's case.

It has long been the law that after the government has furnished a bill of particulars, it is bound by its terms. Moore's Federal Practice, Vol. 8, ¶ 7-44 (1974).

In reversing a trial court which permitted an amendment of a bill of particulars three days before trial, and refused a continuance requested by defense counsel the Third Circuit Court of Appeals, in United States v. Neff, 212 F.2d 297, 309 (3 Cir. 1954) said:

> "Bills of particulars in criminal cases in federal courts are governed by Rule 7(f) of the Federal Rules of Criminal Procedure, 18 U.S.C. which is substantially a restatement of well-

> settled principles. The latter establish that a bill of particulars 'once obtained * * * concludes the rights of all parties who are to be affected by it, and he who has furnished the bill of particulars under it must be confined to the particulars he has specified, as closely and effectually as if they constituted essential allegations in a special declaration' [footnote omitted]
>
> * * *
>
> "It cannot be gainsaid that the burden of the defense was greatly increased by reason of the permitted filing of the second supplemental bill of particulars and that she was deprived of adequate opportunity to meet the charge therein contained. In that respect there was breached its rule that 'The purpose of a bill of particulars is to enable the accused to avoid surprise, and to enable him to prepare for trial'".

The Neff court held that to permit the amendment sought "would be in violation of well settled principles designed to preserve the rights of accused persons."

In United States v. Glaze, 313 F.2d 757 (2 Cir. 1963), this Court noted the Neff decision with approval, and although it affirmed a conviction obtained on evidence at variance with a prior bill of particulars, this Court stated "any unfair surprise could have been remedied by a motion for continuance" -- precisely what defense counsel requested in the case at bar and was denied. Cf. United States v. Murray, 297 F.2d 812, 819 (2 Cir. 1962), cert. den. 369 U.S. 828; United States v. Haskins, 345 F.2d 111, 114 (6 Cir. 1965); United States v. Russo, 260 F.2d 849, 850 (2 Cir. 1958).

POINT TWO

IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO REFUSE DEFENDANT, A BLACK, INQUIRY ON VOIR DIRE ON THE ISSUE OF RACIAL PREJUDICE WHERE DEFENSE COUNSEL REQUESTED SUCH INQUIRY.

In Ham v. South Carolina, 409 U.S. 524 (1973), Justice Rehnquist, writing for the Supreme Court, held that in certain situations a judge must inquire into possible racial prejudice in order to satisfy the demands of due process, following Aldridge v. United States, 283 U.S. 308 (1931). Judge Feinberg, for this Court in United States v. Grant, 494 F.2d 120, 122 (2 Cir. 1974), suggested that the issue presented on appeal involved (1) a possible deprivation of the right to trial by a fair and impartial jury and (2) a request on the part of appellant for the exercise of this Court's supervisory powers. Defendant here relies particularly on (2) above because what this Court said in Grant so recently was a direction to district court judges in this Circuit. Although this Court did not reverse in Grant because of what it termed "overwhelming evidence of appellant's guilt," it said to trial judges in the future:

> "We believe it appropriate, however, to express our view that trial judges in the future should inquire into the subject of racial prejudice, if reasonably requested to do so by defense counsel."

In a footnote the Court observed that six other Circuit Courts of Appeal have held it to be error to refuse

to permit reasonable inquiry into racial prejudice. See United States v. Robinson, 485 F.2d 1157 (3rd Cir. 1973); United States v. Robinson, 466 F.2d 780 (7 Cir. 1972); United States v. Carter, 440 F.2d 1132 (6 Cir. 1971); United States v. Gore, 435 F.2d 1110 (4 Cir. 1970); King v. United States, 362 F.2d 968 (USDC 1966); Frasier v. United States, 267 F.2d 62 (1 Cir. 1959). See Hamling v. United States, 418 U.S. 87, 140 (1974); cf. Ross v. Massachusetts, 414 U.S. 1080 (1973) (dissenting opinion of Justice Marshall).

POINT THREE

IT WAS REVERSIBLE ERROR AND A VIOLATION OF DEFENDANT'S FIFTH AMENDMENT RIGHT TO SILENCE AND HIS SIXTH AMENDMENT RIGHT TO COUNSEL TO PERMIT THE ADMISSION IN EVIDENCE OF DEFENDANT'S STATEMENT MADE TO LAW ENFORCEMENT OFFICERS AND AN ASSISTANT UNITED STATES ATTORNEY AFTER THE DEFENDANT'S ARREST AND AFTER HE HAD REQUESTED AN ATTORNEY WHERE THE RECORD SHOWS NO WAIVER OF HIS RIGHT TO COUNSEL.

As set forth in the statement of facts supra p. 5, defendant, having been advised of his right to have an attorney by Assistant United States Attorney Kaufman, requested an attorney. He was not asked if, understanding his rights, he waived his right to counsel, he was merely asked if he wished to speak and he did (Vol. I, 23, 25).

Even before Miranda v. Arizona, 384 U.S. 436 (1966), due process considerations required a defendant to have

counsel, of his choice or furnished to him if he were indigent, at every important stage of a criminal proceeding. Spano v. New York, 360 U.S. 315 (1959); Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland, 373 U.S. 59 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Massiah v. United States, 377 U.S. 20 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964).

In Miranda the Court said:

> "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisite to the admissibility of any statement made by a defendant." (p. 476, emphasis supplied)

The case at bar represents a situation which is clearly at variance with the spirit and language of Miranda viz:

> "Once warnings have been given the subsequent procedure is clear * * * (p. 473)
>
> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self incrimination and his right to retained or appointed counsel. Escobedo v. Illinois, 378 U.S. 478, 490 n.14 This Court has already set high standards of proof for the waiver of constitutional rights, Johnson v. Herbst, 304 U.S. 458 (1938) and we reassert these standards as applied to in custody interrogation. Since the State is responsible for establishing the isolated circumstances under which interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado

interrogations, the burden is rightly on its shoulders.

> "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in Carnley v. Cochran, 369 U.S. 506, 516 (1962), is applicable here:
>
> > 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'" (At p. 475)

It is clear from the record that the court below did not understand the teaching of Miranda. The inexplicit premise in the court's questioning of Mr. Kaufman (over defense counsel's objection) was that questioning may proceed after the form warnings taken from Miranda have been given unless the defendant affirmatively insists on having a lawyer brought in on the spot. The court below was not aware, or had forgotten that once the defendant says he wants a lawyer one must be supplied to him or he must expressly waive the right to a lawyer before the questioning continues, viz:

> "The Court: I take it you have had cases where a defendant expressed a desire to have a lawyer immediately, where there is a present need for a lawyer on the part of the defendant? (Vol. I, 34)

and again

> "The Court: How do you express his reply if he says, 'I want a lawyer right now'?" (Vol. I, 34)

And finally a statement which suggests that the court's view is that indigent defendants are not entitled to lawyers in the preliminary proceedings before trial,

> "The Court: Because 'Needs an appointed lawyer' of course, lends itself to two interpretations. One is that he needs him right away, and the other is that he cannot afford a lawyer and would eventually need one." (Vol. I, 34)

There is no ambiguity in the record below despite the court's improper interrogation of the government attorney as to his "usual" practice and what he "would" do under certain circumstances when he questioned a defendant in custody. There is simply no evidence of the defendant's knowing waiver of his rights and the statement should have been suppressed.* Cf. Clewis v. Texas, 386 U.S. 707, 708 (1967); cf. People v. Jackson, 22 N.Y.2d 446 (1968); People v. Watts, 29 N.Y.2d 571 (1971).

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* Special Agent Kieran Kobell did testify that the defendant said he did not wish to have counsel present (Vol. I, 45). This, however, was not consistent with Kaufman's testimony which was that he was familiar with the Miranda requirements and he made a notation of everything the defendant said and there was no such notation (Vol. I, 19, 20). In all events, the defendant did not say he "waived" his rights nor was there any testimony that the court could base its finding that he did waive his constitutional right to remain silent and have counsel.

POINT FOUR

THE COURT'S RULINGS AND INTERFERENCE IN DEFENSE COUNSEL'S CROSS-EXAMINATION OF GOVERNMENT AGENTS ON THE ISSUE OF THEIR TRUTHFULNESS AND LATER REMARKS IN ITS CHARGE TO THE JURY, COUPLED WITH THE PROSECUTOR'S IMPROPERLY READING FROM AN ALLEGED CONFESSION NOT IN EVIDENCE DEPRIVED DEFENDANT OF HIS RIGHT TO A FAIR TRIAL.

The thrust of defense counsel's cross-examination of the government agents was to show how often they dissembled and told untruths in order to impeach their credibility on the witness stand. The court frequently interfered with this cross-examination, injecting itself into the proceedings and necessarily blunting the effectiveness of counsel's attack on the federal agents' credibility, viz:

> "Q [By Mrs. Piel to Agent Simpson] Did you make any attempt in the course of your work to be truthful?
>
> "A Yes, ma'am.
>
> "Q But you don't succeed?
>
> "Mr. Batchelder: Objection.
>
> "The Court: The questions are too general. He has already admitted he disguised the identity of a person. From that you can make whatever argument that you want."

By taking over defense counsel's cross-examination the court appeared to be endorsing the agent's conduct and criticizing defense counsel's questions as "improper,"

Q [by Mrs. Piel to Agent Simpson] And you wanted to purchase that cocaine from the defendant in order to arrest him and indict him and bring him to trial in a Federal Court?

A Yes mam.

The Court: That question I rule out as being argumentative, complex and improper. He has already said he didn't succeed in making the purchase.

You did everything you could to lead these persons to believe the money was yours?

The witness: Yes.

The Court: You didn't tell them it was Government money?

The witness: No, sir.

The Court: You also didn't give your own identity?

The witness: No.

The Court: Or your connection with the Government?

The witness: No.

The Court: And you led them to believe this was your money that you were using because you wanted to purchase the cocaine for yourself?

The witness: Yes, sir.

The Court: You said whatever was necessary to reinforce that impression?

The witness: Yes, sir." (Vol. II, 61, 62)

This taking over of defense counsel's cross-examination was extremely prejudicial and served to whitewash counsel's attack on Simpson's credibility. Nor was this all. In the statement of facts, <u>supra</u> p. 5, is a detailed

description of how the court interfered with similar cross-examination of Agent Gordon and in fact prevented counsel from going further in perfectly proper cross-examination. Similarly, the court refused to sustain an objection to the prosecutor reading from Kaufman's statement (as though it were Kobell's) even though it was never placed in evidence (Vol. II, 135, 136).

The damage of this impropriety and interference with the cross-examination before the jury was great since the influence of the trial judge on the jury is "necessarily and properly of great weight." Quercia v. United States, 289 U.S. 466, 470 (1933), cf. Oppenheim v. United States, 241 Fed. 625 (2 Cir. 1917); Johnson v. United States, 270 Fed. 168 (2 Cir. 1920). It is not appropriate for the trial judge to usurp the functions of the representatives of the parties so long as counsel is reasonably competent, or appear to be an advocate for the government. United States v. De Sisto, 289 F.2d 833, 834 (2 Cir. 1961); United States v. Fernandez, 480 F.2d 726 (2 Cir. 1973).

Moreover the effect of the court's interference was to foreclose defense counsel's cross-examination on the all important issue of credibility. See United States v. Fitzpatrick, 437 F.2d 19 (2 Cir. 1970).

POINT FIVE

THE COURT ABUSED ITS DISCRETION IN PERMITTING A FIVE YEAR OLD CONVICTION OF THE DEFENDANT FOR POSSESSION OF STOLEN PROPERTY TO BE USED TO IMPEACH DEFENDANT'S CREDIBILITY.

Defense counsel requested that the court rule on the use of the defendant's conviction for stolen property in 1970 and specifically requested that the prior conviction be ruled out for impeachment purposes. This request was made in anticipation of the defendant's taking the witness stand in his own defense.* In ruling against the defendant's motion, the court said:

> "The charge [possession of stolen property] was a much more serious charge, involving the possession of a loaded weapon, and it was evidently reduced as a result of the usual plea bargaining. At any rate, the Prosecutor would have the right to show the crime to which he pleaded guilty, and since that crime is of recent vintage, five years old, and directly relates to a crime reflecting honesty and integrity, namely stealing ... there is no good reason for my keeping it out of the record" (Vol. II, 22).

Under the authority of United States v. Palumbo, 401 F.2d 270 (2 Cir. 1968) cert. den. 394 U.S. 947, this Court held that a trial judge has the power in the exercise of sound discretion, to make an advance ruling prohibiting the use of a prior conviction for impeachment of a defend-

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* As a result of the court's ruling against the defendant, the defendant did not take the witness stand in his own defense.

ant if he finds that a prior conviction negates credibility only slightly, but creates a substantial chance of unfair prejudice, taking into account such factors as the nature of the conviction, its bearing on veracity, its age, and its propensity to influence the minds of the jurors improperly. See United States v. Puco, 453 F.2d 539, 541 (2 Cir. 1971).

It is here submitted that the court erred in ruling against the defendant in this instance since possession of stolen property does not necessarily reflect on veracity, the conviction was five years old (when the defendant was 25 years of age), was defendant's only prior conviction and the result was that he was practically deprived of the effectiveness of his own testimony in his defense.

POINT SIX

THE COURT PREJUDICIALLY REFUSED TO INSTRUCT THE JURY ON THE ISSUES OF ENTRAPMENT, ON LEGAL PRINCIPLES CONCERNING WITHDRAWAL FROM THE CONSPIRACY AND ON PARTICIPATION IN A SINGLE TRANSACTION NOT AMOUNTING TO A CONSPIRACY ALTHOUGH SUCH INSTRUCTIONS WERE REQUESTED.

The defendant is entitled to have instructions presented to the jury relating to every theory of the defense for which there is any foundation in the evidence, Perez v. United States, 297 F.2d 12, 13-14 (5 Cir. 1961). Nor may

the trial judge refuse to give instructions on any issue of possible defense which the jury may choose to believe, Strauss v. United States, 376 F.2d 416, 419 (5 Cir. 1967). Failure of the trial court to so instruct upon application and exception is reversible error. United States v. Noah, 475 F.2d 688, 697 (9 Cir. 1973).

In the case at bar there was evidence that the government agents were trying as hard as they could to involve the defendant in a conspiracy (Vol. II, 58, 61). There was further, at least a suggestion in the record that they did not succeed (Vol. II, 58, 61). Under these circumstances the defendant was entitled to an instruction on entrapment. Sorrells v. United States, 287 U.S. 435 (1932); Lopez v. United States, 373 U.S. 427 (1963).

In addition, defendant offered an instruction (Proposed Instructions 9 and 11) on abandonment of the conspiracy (A-33,34) -- if the defendant abandoned the conspiracy (and there was certainly evidence that he did not go through with it). See United States v. Britton, 108 U.S. 199, 204, 205 (1883); United States v. Hyde, 255 U.S. 347 (1917). The court refused to give these instructions.

Finally in the face of an ambiguous record as to what the conspiracy was -- (was there a conspiracy on February 13, 1974 to purchase $7000 worth of cocaine? Was there a conspiracy to purchase $6500 worth of flake cocaine?

Was there another conspiracy on February 19, 1974? Were the co-conspirators only the government agents?) -- the court refused proposed instructions No. 10 (A-34) to the effect that a single narcotics transaction may be insufficient to warrant conviction for a conspiracy. See United States v. Aqueci, 310 F.2d 817 (2 Cir. 1962), cert. den. 372 U.S. 959 (1963); United States v. Falcone, 311 U.S. 205, 210, 211 (1940).

POINT SEVEN

THE COURT MISLED THE JURY BY REPEATED REFERENCES TO A $7000 TRANSACTION TO WHICH IT ERRONEOUSLY ATTRIBUTED DEFENDANT'S OWN ADMISSION, UNDERCUTTING DEFENSE COUNSEL'S SUMMATION AND ASSURING DEFENDANT'S CONVICTION.

The pivotal and all-important role of the trial judge in a criminal trial has already been noted in this brief (Point Four, supra), Quercia v. United States, 289 U.S. 466 (1933), United States v. Fernandez, 480 F.2d 726 (1973). In the statement of facts, supra, p. 5, a detailed analysis of defense counsel's attack on the prosecution's case is set forth. She suggested that evidence concerning the February 13, 1974 incident and the February 19, 1974, incident (the recorded taped conversation and the later appearance, seriatim, but not together, of all the characters at 96th and Park Avenue) did not make sense when considered together and that the agent's testimony concerning $7000

was made unbelievable by the February 19th conversation in which the defendant said to Simpson "I didn't know what you were looking for."

The court put the prosecution's case together by erroneously charging the jury that the defendant admitted to a $7000 cocaine deal with federal officials (Vol. II, 165, 169, 175). The court's later advice to the jury that an error had been made could not cure the harm done (Vol. II, 183).

POINT EIGHT

THE AGGREGATE OF THE ERRORS OF THE COURT BELOW COMPELS REVERSAL BY THIS COURT.

In Kotteakos v. United States, 328 U.S. 750, 764-765 (1946) the Court said on the issue of error:

> "... if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Appellant

June 2, 1975

State of New York)
: ss.:
County of New York)

Susan Stern, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 14 Ribbon Lane, Wantagh, New York.

On May 30, 1975, deponent served the within Brief and Appendix upon Paul J. Curran, United States Attorney, in this action, at U.S. Courthouse, Foley Square, NY, NY 10007, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within theState of New York.

Susan Stern

Susan Stern

Sworn to before me this
30th day May, 1975

ELEANOR JACKSON PIEL
Notary Public, State of New York
No. 31-8367600
Qualified in New York County
Commission Expires March 30, 1976